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No. 85-121

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

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RALPH KEMP, WARDEN

Petitioner

vs.

CHARLIE YOUNG, JR.

Respondent

--------oOo--------

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF OF RESPONDENT IN OPPOSITION

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No. 85-121

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| RALPH KEMP, WARDEN, | ) | October Term, 1984 |
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| Petitioner | ) | |
| | ) | |
| vs. | ) | ON PETITION FOR A WRIT OF |
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| CHARLIE YOUNG, JR., | ) | STATES COURT OF APPEALS |
| | ) | FOR THE ELEVENTH CIRCUIT |
| Respondent | ) | |

BRIEF OF RESPONDENT IN OPPOSITION

## I. Statement of the Case

A. Factual Summary. On December 15th, 1975, Reuben H. Flynt, Vice President of the Farmers Bank of Union Point, Georgia, was killed at his home. Police investigation revealed that the respondent, Charlie Young, Jr.,[1] and his nephew, Derwin Young, had driven from Atlanta to Union Point on the morning of December 15th, 1975, so that respondent could discuss with Mr. Flynt certain notices he had received from the bank concerning delinquencies in his payment of loans. Respondent drove to the bank, to Mr. Flynt's house, and then back to the bank and to Mr. Flynt's house again before locating Flynt's car. Respondent went to the door of Flynt's house and rang the doorbell, but was rebuffed by Flynt who told him to come see him at the bank in thirty minutes. Respondent then returned to the car, got a .22

[1]Respondent, a young black man, has been described as "articulate" and "college-trained." He once received a job recommendation from the Sheriff of Greene County. See, Young v. Ricketts, 242 Ga. 559, 560-61.

caliber pistol, and returned to Flynt's house where he asked to use the telephone to call his grandmother. After trying unsuccessfully to reach his grandmother, respondent again tried to talk with Flynt concerning the outstanding loans. An argument ensued, Young and Flynt struggled, and Young shot Flynt several times with the pistol at close range. Respondent was slightly injured in the altercation. Respondent then ripped the telephone from the wall, took Flynt's wallet from his rear pocket, and left.

Respondent and his nephew drove back to the bank. Respondent then gave his nephew the wallet, and told him to go into the bank and give it to Mr. Stewart (the President of the bank) and to get $60,000. Derwin Young subsequently entered the bank, approached a teller, handed her the billfold, and said, "The man that gave me this billfold said for you to give me $60,000 or he will kill Reuben Flynt in fifteen minutes." The President of the bank directed the teller to comply, and she placed approximately $10,000 in a bag and gave it to Derwin Young. Meanwhile, the police had been alerted, and Derwin Young was arrested upon leaving the bank. Charlie Young was not seen at the bank, but was later found at his grandmother's house, where he was arrested. A .22 caliber pistol was discovered beneath the driver's seat of the car he had been driving. Bullets later removed from the victim's body were determined to have been fired from this pistol. The victim died from loss of

blood due to the gunshot wounds and several lacterations on his head, which were inflicted by Young with the butt of the gun during the struggle.

After he was arrested and advised of his Miranda rights, Young gave a statement recounting the events of December 15th, 1975. He admitted struggling with Flynt, striking him, and shooting him with the pistol, but denied that he had gone to Flynt's house for the purpose of robbing him. He instead maintained that he had not decided to attempt to obtain money from the bank by the use of Flynt's wallet until after the fatal altercation had occurred.[2] Young also gave consent for the police to search the automobile, and it was after this consent was given that the police found the pistol underneath the seat of the car.

B. Course of Proceedings and Dispositions in the Courts Below. Young subsequently was tried and convicted of murder, armed robbery, and robbery by intimidation in the Superior Court of Greene County, Georgia, on February 18th and 19th, 1976. He was sentenced to death for murder based upon the jury's finding beyond a reasonable doubt that two "statutory aggravating circumstances" existed under the provisions of Georgia's death penalty statute. These "aggravating circumstances" were that the murder was committed during the course of an armed robbery,

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[2]Although the record does not establish whether Young gave any further explanation for his conduct, one reasonable inference not excluded by the evidence is that he attempted to get the money in order to finance a getaway.

another capital felony, and that the murder was committed for the purpose of obtaining money. See, OCGA § 17-10-30(b)(2) [formerly Georgia Code Ann. § 27-2534.1(b)(2)] and OCGA § 17-10-30(b)(4) [formerly Georgia Code Ann. § 27-2534.1(b)(4)].

After exhausting his state remedies, Young filed a habeas corpus action pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia. He raised several constitutional claims, two of which are relevant to the disposition of this petition: (1) he had been denied effective assistance of counsel at both stages of his bifurcated trial; and (2) the evidence produced at his trial was insufficient to support the jury's finding of aggravating circumstances beyond a reasonable doubt, i.e., to support a sentence of death.

The district court ruled that Young's counsel had been reasonably effective at the guilt-innocence phase of his trial, and denied his request for a new trial as to guilt. The district court agreed with Young, however, that his counsel had been ineffective at the sentencing phase of his trial, and that the evidence was constitutionally insufficient to support the death sentence. This last ruling (that the evidence was insufficient to support the sentence of death) was based upon the district court's finding that there was no evidence in the record to establish that Young had committed the murder for the purpose of obtaining money, or that it was committed "in the course of"

the robberies. The district court explained its ruling as follows:

> Petitioner also asserts as a basis for habeas corpus relief that the evidence at trial did not support the jury's finding of statutory aggravating circumstances contained in Ga. Code Ann. § 27-2534.1(b)(2), that the murder was committed during the course of an armed robbery, and § 27-2534.1(b)(4), that the murder was committed for the purpose of obtaining money. Having carefully considered all the evidence presented at trial, the court finds that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed in the course of an armed robbery or for the purpose of obtaining money. The only relevant evidence presented at trial indicated that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck, i.e., after the murder had been committed. See, testimony of F.B.I. Agent Kane, Trial Transcript, pp. 372-373. Based on the evidence presented at trial that petitioner prior to the commission of the murder had any intent to rob the victim is only speculation. Certainly the evidence does not prove these aggravating factors beyond a reasonable doubt. Considering the evidence in this case and the plain language of Ga. Code Ann. § 27-2534.1(b)(2) and (4),

> the removal of the victim's wallet and the attempt to obtain money from the bank cannot be considered as aggravating factors of the already committed murder. Petitioner was therefore sentenced to death based on an improper finding of aggravating circumstances, and for this reason must be resentenced. Young v. Zant, 506 F.Supp. 274, 280-81 (M.D. Ga. 1980). (Emphasis original)

The state appealed the district court's rulings invalidating Young's death sentence. Young cross-appealed from the denial of his other claims. The Court of Appeals reversed the district court's ruling that Young had effective assistance of counsel at the guilt-innocence phase of his trial. Young v. Zant, 677 F.2d 792 (11th Cir. 1982). Although the Court of Appeals did not specifically say that it affirmed the district court's ruling that there was insufficient evidence to support Young's death sentence, it noted with approval the district court's analysis of that issue as it related to his claim of ineffective assistance of counsel:

> The District Court concluded (with respect to Young's death sentence) that the undisputed evidence showed that Flint was completely incapacitated before Young formed the intent to rob him. Thus, the court reasoned, the state had failed to prove that any of

the essential elements of armed robbery, the taking of property from a person "by use of an offensive weapon," Ga. Code Ann. § 26-1902, occurred prior to the assault; nor had it shown that Young's purpose in assaulting Flint was to obtain money. (677 F.2d at p. 794, n. 3).

The Court of Appeals went on to make these observations:

> (T)he District Court, in assessing the sufficiency of the state's evidence of aggravating circumstances on the malice murder charge, concluded that the state did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flint prior to the fatal assault. Young v. Zant, 506 F.Supp. at 280-81. This deficiency in the evidence should have been sufficiently clear to trial counsel to suggest a strong argument that Young did not rob Flint by the use of an offensive weapon and thus could not be guilty of armed robbery under Ga. Code Ann. § 26-1902. (677 F.2d at p. 799).

The Court of Appeals' judgment provided as follows:

> The district court's denial of the writ of habeas corpus with respect to the guilt phase of Charlie Young's trial is therefore REVERSED. On receipt of the mandate, the district court shall grant the writ. (677 F.2d at p. 800) (Emphasis supplied).

After the Court of Appeals' original decision in this case, it was returned to the state court system, where a new indictment was returned by the Greene County Grand Jury, again charging Young with the offenses of murder, armed robbery, and robbery by intimidation.[3] Then, on December 8th, 1982, Young's counsel were served with a new "notice of statutory aggravating circumstances" indicating that the state would again seek the death penalty. The listed aggravating circumstances included the same two utilized at Young's original trial, which were found not supported by sufficient evidence in the district court's original ruling in this case. In addition, the "notice" indicated that the state would seek to submit to the jury a third and new aggravating circumstance: that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." [See, OCGA § 17-10-30(b)(7)].

Young filed a plea of former jeopardy in response to this new "notice of statutory aggravating circumstances," based on the district court's ruling vacating the death sentence for want of evidence to support it and the cases of Burks v. United States, 427 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). This plea was overruled by the trial court and

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[3]These charges were based upon the same conduct as the original indictment. The new indictment apparently was sought to avoid possible problems with the makeup of the grand jury pool. (See, 506 F.Supp. at 277).

appealed to the Supreme Court of Georgia.[4] The Supreme Court of Georgia found no double jeopardy bar either to a new death sentence or to the use of the same aggravating circumstances relied upon by the state at Young's original trial, because, according to the Georgia court, the district court's ruling regarding the sufficiency of the evidence had been "reversed" by the United States Court of Appeals. See, Young v. State, 251 Ga. 153, 303 S.E.2d 431 (1983).[5]

Young's subsequent petition for writ of certiorari in the Supreme Court of the United States wad denied, with two justices dissenting. See, Young v. Georgia, _____ U.S. _____, 104 S.Ct. 740, 79 L.Ed.2d 198 (1984).

The case was returned to Greene County, Georgia, Superior Court and a new trial date of April 17th, 1984, was set. On March 14th, 1984, Young filed a "motion to enforce judgment" in the United States District Court for the Middle District of Georgia under caption of his original habeas corpus action. He alleged that the state was proceeding to retry him, and was seeking the death penalty against him, in violation of the district court's original ruling. He asked the district court to reassert its jurisdiction in his case, to issue an order compelling obedience to the district court's original ruling

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[4]Georgia law provides an absolute right to an interlocutory appeal from the denial of a plea of former jeopardy. Patterson v. State, 248 Ga. 805, 287 S.E.2d 7 (1982).

[5]This is a six-to-one decision. Chief Justice Harold Hill dissented.

entered December 5th, 1980, and to prohibit the state from seeking the death penalty against him at his second trial.

The district court took jurisdiction of Young's motion, but denied the relief sought.[6] Young then appealed to the United States Court of Appeals for the Eleventh Circuit.

The Court of Appeals sustained Young's double jeopardy claim and remanded to the district court with instructions that an order be issued prohibiting the state from seeking the death penalty on retrial. Young v. Kemp, No. 84-8408, United States Court of Appeals, Eleventh Circuit, decided May 3, 1985. (See Appendix "A" to state's Petition for Writ of Certiorari.)

Rehearing and rehearing en banc were denied without any judge of the Court of Appeals requesting that the court be polled on rehearing en banc. (See Appendix "B" to state's Petition for Writ of Certiorari.)

The petition now before this court subsequently was filed.

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[6]The district court's order provides that appellant's motion to enforce judgment was denied after "preliminary consideration" of the issues involved and contains discussion favorable to both sides of this controversy. It is apparent from the opinion that the district court simply wanted guidance from the Court of Appeals and intended its order primarily as a vehicle to get the case before the court for a decision.

## II. Argument

### A. THE DOUBLE JEOPARDY CLAUSE APPLIES TO SENTENCING TRIALS UNDER GEORGIA'S DEATH PENALTY STATUTE.

In its petition for a writ of certiorari, the state first contends that the Double Jeopardy Clause does not apply to sentencing trials conducted pursuant to Georgia's death penalty statute. It argues that the decision of the Court of Appeals in this case involves an erroneous and unwarranted "extension" of the holding of Bullington v. Missouri, 451 U.S. 430 (1981) which will have "disastrous consequences" for Georgia's death penalty law and all others modeled after it. (State's petition, at p. 8) The state goes on to argue that there is a "significant difference" in the Georgia statute involved in this case and the Missouri statute involved in Bullington. As will be demonstrated, however, no such difference exists, and no "extension" of Bullington has been made by the Court of Appeals.

The statute involved in this case is codified at OCGA § 17-10-30 and 17-10-31. The provisions are reproduced in full as Appendix "A" to this brief. The relevant provisions of the Missouri statute involved in Bullington are reproduced in full and attached as Appendix "B." (Missouri Revised Statutes §§ 565.006, 565.008, and 565.012) Examination of the two statutes reveals that the two are virtually identical. Both provide that the state must prove (in addition to all of the elements of murder) at least one statutory "aggravating

circumstance" before a sentence of death is authorized. [Compare OGCA § 17-10-31 and Mo. Rev. Stat. Ann. § 565.012(5)] Both statutes provide that the state must prove the "aggravating circumstance" beyond a reasonable doubt. [Compare OCGA § 17-10-30(c) and Mo. Rev. Stat. Ann. § 565.012(4)] Both statutes restrict the discretion to the sentencer to two options: life imprisonment or death. [Compare OCGA § 17-10-30(c) and 17-10-31 with Mo. Rev. Stat. Ann. §§ 565.006, 565.008, and 565.012(4) and (5)] Both statutes require the sentencer to make its decision based on substantive standards and evidence introduced in a separate proceeding that formally resembles trial. [Compare OCGA §§ 17-10-30 and 17-10-31 with Mo. Rev. Stat. Ann. §§ 565.006, 565.008, and 565.012]

The state nevertheless argues that Georgia's statute, as "interpreted" by the Supreme Court of Georgia, is "different." See, Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982). The Supreme Court of Georgia cannot make the statute something other than what it is by saying so, however. Moreover, the Georgia Supreme Court has itself characterized the Georgia statute as "essentially identical" to the Missouri statute. See, Godfrey v. State, 248 Ga. 616, 617, 284 S.E.2d 422, ____ (1981), cert. denied 456 U.S. 919 (1982).

All of the features of the Missouri statute which led this court to its decision in Bullington characterize the Georgia statute as well. This court cannot apply the Double Jeopardy

Clause to one and not to the other because of any "significant differences" in the two statutes simply because none exist.

The state does not expressly ask this court to consider overruling Bullington. This extraordinary action would be unjustified in any event. In the recent case of Arizona v. Rumsey, _____ U.S. _____, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), this court refused to overrule Bullington, noting that no "special justification" had been shown to depart from the doctrine of stare decisis. A careful analysis of this case reveals no reason for the court to take jurisdiction in order to consider again the exceptional action of overruling such a recent precedent. In fact, a careful analysis of the two statutes in question leads inexorably to the conclusion that Bullington was correctly decided.

The overall effect of the Georgia and Missouri death penalty statutes is not to create a special form of punishment for exceptional cases; it is to create a distinct grade of homicide for which exceptional punishment may be imposed. Functionally, the "aggravating circumstances" listed in the two statutes are nothing less than elements of a distinct offense one might call "aggravated murder." The state may seek a sentence of death if it can prove beyond a reasonable doubt all of the elements of "ordinary murder," and then carry the additional burden of proving, again beyond a reasonable doubt, an additional

element or "aggravating circumstance." Unless the state proves all of the elements of "aggravated murder" there can be no "conviction" for that offense and no sentence of death, though there may be a conviction for "ordinary murder."

That the aggravating factors are proved at a "sentencing hearing" after a conviction for "ordinary murder" has been obtained does not alter the fact that the "aggravating circumstance" operates as an element of the crime, for it must be proved beyond a reasonable doubt by competent and admissible evidence as must all elements of any crime. It must follow from this that double jeopardy principles apply to the second stage of a death penalty trial, whether or not the same is called a "sentencing hearing," for if the state fails to prove an essential element of an offense, it has failed to prove the offense itself.

Bullington and Rumsey merely recognize the reality that death penalty statutes such as Georgia's operate to create a distinct offense of aggravated murder. The state has suggested nothing which changes this reality; and the court should therefore decline jurisdiction of this case.

B. THE COURT OF APPEALS DID NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE SUPREME COURT OF GEORGIA REGARDING CONSTRUCTION OF STATE LAW.

The state next argues that the Court of Appeals substituted its judgment for that of the Supreme Court of Georgia in

interpreting state law relative to the offense of armed robbery. Essentially, the state argues that the Court of Appeals misinterpreted the Georgia armed robbery statute in holding that there was insufficient evidence to establish armed robbery as an aggravating circumstance in the homicide case against respondent. There are several fallacies involved in this argument.

First, the ruling the state is actually complaining about is the ruling of the district court in respondent's original habeas corpus case which was decided five years ago. See, pp. 4-6, supra, wherein the original decision of the district court is discussed. The state appealed this ruling to the Court of Appeals, with the result that it was left undisturbed by the Court of Appeals' original opinion in this case. See, Young v. Kemp, No. 84-8408, United States Court of Appeals, Eleventh Circuit, decided May 3, 1985, at pp. 7-12 of Appendix "A" to the Petition for Writ of Certiorari, and especially n. 7 of the Court of Appeals' opinion. The issue the state now asks this court to resolve was not raised by motion for rehearing in the Court of Appeals or by petition for writ of certiorari in this court at the time (1982) the Court of Appeals rendered its original decision in Charlie Young's case.

Second, neither the original district court opinion nor the latest decision of the Court of Appeals is based upon an erroneous construction of state law. The district court held

(see pp. 4-6, supra) that there was no evidence in the record to establish that the killing of Reuben Flynt was "in the course of" a robbery or "for the purpose of" obtaining money. The evidence indicated that respondent went to the victim's house to discuss a delinquent bank loan, not to kill him; that the discussion resulted in a fight, which in turn resulted in the banker's death; and that the respondent thereafter decided to try to obtain money from the bank, presumably to finance a getaway.

The Supreme Court of Georgia interpreted this as a ruling that respondent could not be guilty of robbery because the victim was dead before the theft took place. It then criticized this ruling as inconsistent with its construction of the Georgia armed robbery statute in Moore v. State, 233 Ga. 861, 213 S.E.2d 829, 832 (1975), wherein it was held that a defendant may be convicted of robbing his dead victim if the defendant's "admitted purpose in going to [the victim's] house was to rob him." 213 S.E.2d at 832.

This is not the only reasonable interpretation of the district court's opinion, however; and it is not the interpretation of the Court of Appeals in the decision the state asks this court to review. The district court's opinion was based upon the premise that there was insufficient evidence [under Jackson v. Virginia, 443 U.S. 307 (1979)] to establish that the robbery in question was committed in the course of the murder, inasmuch as there was no evidence to establish that respondent had any thought of robbing the victim before he had killed him. In the

district court's words, "(b)ased on the evidence presented at trial that petitioner prior to the commission of the murder had any intent to rob the victim is only speculation." Young v. Zant, 506 F.Supp at 280-81. The Court of Appeals, in the decision the state asks this court to review, observed:

> The district court did not hold that there can be no armed robbery merely because the victim dies prior to the taking (a holding which would be in derogation of Moore v. State); rather, the district court held that the murder must be "in the course of" the armed robbery, and that the murder here was not "in the course of" the armed robbery because the intent to rob was an afterthought and was not formulated until after the murder was entirely completed (a holding which is not inconsistent with Moore v. State). . . . Thus, the district court finding turns not on the notion that armed robbery cannot legally occur subsequent to the incapacitation or death of the victim, rather, the decision turns on the district court's conclusion that there was no evidence that the murder was committed in the course of the armed robbery or for the purpose of obtaining money, because the intent to rob and the purpose to obtain money were afterthoughts and, thus, non-existent until after the murder was entirely completed. . . . We conclude that there was no erroneous construction of the Georgia statute. (Appendix "A" to Petition for Writ of Certiorari, pp. 13-15)

Thus, it is apparent that the issue now raised by the state regarding the proper role of the federal courts in "construction" of state laws is not involved in this case. The disagreement between the state court judges and federal judges who have reviewed this case is not over construction of a state statute; it is over what inferences reasonably may be drawn from the facts in the record, and whether these facts would authorize a rational juror to find that the death of Reuben Flynt resulted from a scheme devised by Charlie Young to rob Flynt and the bank. The federal district courts have undisputed authority to review the records in state court criminal cases and to determine the sufficiency of the evidence contained therein to support a finding of fact. Jackson v. Virginia, supra. There is therefore no error or overstepping of authority involved in the Court of Appeals' decision which would justify review by this court.

## III. Conclusion

The state has greatly exaggerated the significance of this case as a precedent and its impact on other death penalty cases. No extension of Bullington v. Missouri is involved; nor has there been an abuse of the federal courts' power to review the judgments of state courts.

The court should deny the petition for a writ of certiorari.

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APPENDIX "A"

OFFICIAL CODE OF GEORGIA ANNOTATED (1982)

17-10-30 Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other things of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3.)

17-10-31 Requirement of jury finding of aggravating circumstance and recommendation that death penalty be imposed prior to imposition of death sentence.

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of ıth shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death.

Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict,the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. This Code section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty. (Code 1933, § 26-3102, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 809, § 1; Ga.L. 1973, p. 159, § 7.)

APPENDIX "B"

MISSOURI REVISED STATUTES

565.006. Verdict as to guilt when rendered--finding of guilt, effect of--presentence hearing, admissible evidence--penalty, when imposed--reversible error, effect of.--

1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment, and by their verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal

convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(L. 1977 H. B. 90 § 3)

565.008. Death penalty, when imposed--life imprisonment, when imposed--minimum of fifty years to be served, when--first and second degree murder, penalties for.--

1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

2. Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives. Persons convicted of murder in the second degree shall be punished by imprisonment by the division of corrections for a term of not less than ten years. (L. 1977 H.B. 90 § 3)

565.012. Evidence to be considered in assessing punishment in capital murder cases.--

1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence,

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. (L. 1977 H. B. 90 § 5)